

The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STRIKE 3 HOLDINGS, LLC, a
Delaware corporation,

Plaintiff,

v.

JOHN DOE, subscriber assigned IP
address 73.225.38.130,

Defendant.

No. 2:17-cv-01731-TSZ

**DECLARATION OF LINCOLN
BANDLOW IN SUPPORT OF
PLAINTIFF/COUNTER-
DEFENDANT'S MOTION TO
COMPEL PRODUCTION OF
DOCUMENTS**

Note on Motion Calendar:
July 5, 2019

I, Lincoln Bandlow, do hereby state and declare as follows:

1. My name is Lincoln Bandlow. I am over the age of 18 and am otherwise competent to make this declaration.
2. This declaration is based on my personal knowledge and, if called upon to do so, I will testify that the facts stated herein are true and accurate.
3. I represent Strike 3 Holdings, LLC ("Strike 3" or "Plaintiff") in the above-captioned matter.

1 4. Concurrently-filed Exhibit “A” contains a true and correct copy of
2 Defendant’s Responses to Plaintiff’s Second Set of Requests for Production, which also
3 contains Plaintiff’s Second Set of Requests of Production.

4 5. Concurrently-filed Exhibit “B” contains a true and correct copy of the
5 conferral letter Plaintiff sent to Defendant on June 14, 2019 outlining its concerns with
6 Defendant’s responses.

7 6. Strike 3 served its Second Set of Requests for Production on Defendant on
8 May 7, 2019.

9 7. Defendant responded to this Second Set of Requests on June 6, 2019. *See*
10 Exhibit “A.”

11 8. Defendant’s Response was the first time Plaintiff had learned that Defendant
12 was claiming a common interest privilege existed in this matter.

13 9. Concerned with this and other responses and objections, Plaintiff sent a
14 conferral letter to Defendant’s counsel on June 14, 2019 outlining these concerns and
15 requesting the parties meet and confer to try and resolve these issues without the Court’s
16 intervention. *See* Exhibit “B,” p. 11.

17 10. The parties conferred about Defendant’s responses on June 18.

18 11. During the meeting, Plaintiff raised doubts about Defendant’s invocation of
19 the “common defense” privilege. Defendant’s counsel stated that there was a common
20 defense privilege because Plaintiff had suggested Doe’s son would be sued for infringement
21 but did not otherwise provide any evidence or support that Defendant and Defendant’s Son
22 had a common interest protected by the privilege or that the communications furthered that
23 interest.

24 12. Plaintiff’s Conferral Letter had also requested a privilege log so that Plaintiff
25 could better understand what items were being withheld on the basis of this privilege. *See*
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1 Exhibit “B,” p. 6. Defendant did not produce a privilege log during the meet and confer or
2 at any time since.

3 13. The parties discussed other discovery issues as well, including the
4 whereabouts of documents Defendant said he would produce in his June 6 Response. *See*
5 *generally* Exhibit “B.”

6 14. As of the time of the filing of this Declaration, Plaintiff has not received the
7 documents discussed in Requests Nos. 47 and 48.

8 15. Indeed, with respect to Request No. 48, Defendant assured Plaintiff that it
9 would not withhold any documents on the grounds of relevancy.

10
11 I hereby declare under penalty of perjury under the laws of the United States of
12 America that the foregoing is true and correct.

13 Executed on this 20th of June, 2019, at Los Angeles, California.

14
15 By: /s/ Lincoln Bandlow
Lincoln D. Bandlow
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CERTIFICATE OF SERVICE

I, Jeremy Roller, hereby certify that on June 20, 2019, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system which will send notification of filing to the following parties:

Adrienne D. McEntee, WSBA #34061
Beth E. Terrell, WSBA #26759
Email: bterrell@terrellmarshall.com
amcentee@terrellmarshall.com
936 North 34th Street, Suite 300
Seattle, Washington 98103-8869
Telephone: (206) 816-6603
Facsimile: (206) 319-5450

J. Curtis Edmondson, WSBA #43795
Email: jcedmondson@edmolaw.com
EDMONDSON IP LAW
399 NE John Olsen Avenue Hillsboro
Oregon 97124
Telephone: (503) 336-3749

Attorneys for Defendant

DATED this 20th day of June 2019 at Seattle, Washington.

/s/ Jeremy E. Roller

Jeremy E. Roller

Exhibit A

THE HONORABLE THOMAS S. ZILLY

U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

STRIKE 3 HOLDINGS, LLC, a Delaware
corporation,

Plaintiff,

vs.

JOHN DOE, subscriber assigned IP
address 73.225.38.130,

Defendant.

JOHN DOE subscriber assigned IP
address 73.225.38.130,

Counterclaimant,

vs.

STRIKE 3 HOLDINGS, LLC,

Counterdefendant.

NO. 2:17-cv-01731-TSZ

**PLAINTIFF'S SECOND SET OF
REQUESTS FOR PRODUCTION
AND RESPONSES THERETO**

TO: JOHN DOE, subscriber assigned IP address 73.225.38.130, and his counsel of record.

Pursuant to Rule 34 of the Federal Rules of Civil Procedure and the Local Rules of this Court, Plaintiff Strike 3 Holdings, LLC, by and through its undersigned counsel, hereby requests that Defendant John Doe, subscriber assigned IP address 73.225.38.130 respond to the

1 following Requests for Production and produce the documents and tangible things identified
 2 below within 30 days of service, at the offices of Arete Law Group, 1218 3rd Avenue, Suite
 3 2100 Seattle, Washington, 98101-3094.

4 The following definitions and instructions apply to each of the Requests herein.

5 **DEFINITIONS**

6 A. “ANTI-COMPUTER FORENSIC SOFTWARE” means any software
 7 specifically designed to encrypt, destroy, erase, delete, or wipe out files, data, or user activity
 8 on a Computer Device. This includes but is not limited to Evidence Eliminator, CCleaner, File
 9 Shredder, Eraser, Kill Disk, BC Wipe, X Shredder, Wipe MFT, SDelete, CyberScrub, and
 10 Window Washer.

11 B. “BITORRENT” means a peer-to-peer file transfer protocol for sharing large
 12 amounts of data over the Internet, in which each part of a file downloaded by a user is
 13 transferred to other users.

14 C. “CLOUD BASED STORAGE SYSTEM” means a model of data storage where
 15 the digital data is stored in logical pools, the physical storage spans multiple servers (and
 16 possibly locations), and the physical environment is typically owned and managed by a hosting
 17 company. This includes, but is not limited to, third party cloud storage systems such as
 18 Amazon Cloud Drive, Apple iCloud, DropBox, Google Drive, MediaFire, Mega, Microsoft
 19 OneDrive, and SpiderOak.

20 D. “COMMUNICATION(S)” shall refer to every manner or means of disclosure,
 21 transfer, transmission, or exchange of information, whether orally or by DOCUMENTS and
 22 whether face-to-face, in person, in a group, by telephone, by letter, facsimile, telex or telecopy,
 23 or by any other process, electric, electronic or otherwise, and includes any DOCUMENTS as
 24 defined herein including any medium which abstracts, digests, records, or transcribes any such
 25 communication, or any subsequent review or discussion of such communication.
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1 E. The term “COMPLAINT” or “ACTION” means the case filed in the United
2 States District Court for the Western District of Washington, under docket number 2:17-cv-
3 01731-TSZ.

4 F. “COMPUTER DEVICES” means any computer device, including any computer
5 laptop or desktop, mobile phone, iPad or other tablet device, external hard drive, portable hard
6 drive, server, NAS (Network-Attached Storage), USB (thumb) drive, internal hard drives which
7 may have been removed from their original device, solid state hard drives, or any other
8 electronic device capable of connecting to the internet, downloading media files, or storing
9 electronic data, within your possession and control.

10 G. “DOCUMENT(S)” shall have the broadest meaning permitted by Rule 34(a) of
11 the Federal Rules of Civil Procedure, and shall include, without limitation, any tangible record
12 of intelligence or information, whether handwritten, typed, printed or otherwise visually or
13 orally reproduced, including information stored on magnetic or optical media or in solid state
14 storage devices, notes, drafts, reports, films, videotape, drawings, graphs, photographs,
15 illustrations, agreements, letters, test data, circuit diagrams, software structure charts, software
16 flow charts, software functional specifications, software code, data flow diagrams, hardware
17 schematic diagrams, hardware logic diagrams, field maintenance print sets, timing diagrams,
18 technical summaries, product description documents, software description documents, World
19 Wide Web internet pages (whether archived or current), laboratory or engineers’ notebooks,
20 project or progress reports, database information, whether for prototypes or production
21 products, and the like that are in possession, custody, or control of DEFENDANT, or to which
22 DEFENDANT otherwise has access. Any such documents bearing on any sheet (front or
23 back), margins, attachment, or enclosure thereof, and any mark that is not a part of the original
24 text or reproduction thereof, is to be considered and produced as a separate document.
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1 H. "CONTROL" means in your possession, custody, or control and includes
2 documents and things in the possession, custody or control of any other person in your house,
3 apartment or dwelling.

4 I. "FILE" and "FILES" mean the complete file, folder, binder, or other filing
5 system, and all documents contained therein as of the date of production, and all documents not
6 physically in the file, folder, binder, or other filing system that are normally kept within the file,
7 folder, binder, or other filing system in the normal course of business.

8 J. "ISP" means the Internet Service Provider who assigned the IP address to
9 DEFENDANT'S name and physical address.

10 K. "PEER-TO-PEER SOFTWARE" means a program using peer-to-peer (P2P)
11 networking technology, which allows multiple users to transmit media files such as books,
12 music, movies, and games, across a network of computers without the need for central
13 coordination by servers or stable hosts.

14 L. "PERIOD OF RECORDED INFRINGEMENT" means from August 12, 2016 to
15 December 9, 2017.

16 M. "PERSON" and "PERSONS" mean and include natural persons and, without
17 limitation, companies, firms, associations, proprietorships, partnerships, joint ventures,
18 agencies, consortiums, associations, societies, corporations, and other legal entities, as well as
19 their parents, subsidiaries, and affiliates, and all divisions, departments and units of any of
20 them.

21 N. "RELATE(S)" and "RELATING" shall be construed in their broadest sense to
22 require information, documents, or things which directly or indirectly construe, comprise,
23 concern, constitute, relate, pertain to, mention, explain, identify, describe, discuss, refer to
24 (directly or indirectly), reflect, regard, evidence, represent, comment upon, be connected with,
25 or summarize the subject of the request for documents.
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O. "SERVER" means any device that manages access to a centralized resource or service in a network.

P. "STRIKE 3" or "PLAINTIFF" means Strike 3 Holdings, LLC, and all of its agents, servants, employees, investigators, attorneys, affiliates, subsidiaries, and all other persons or entities representing either or acting on its behalf.

Q. "USED" means connected the device to a computer or other device, connected the device to a power source, stored files on the device, copied files to the device, copied files from the device, erased files from the device, accessed files on the device, viewed files on the device, or engaged in any combination of the foregoing.

R. "USER ANONYMITY SOFTWARE" any software or service specifically designed to mask, switch, or hide an IP address or e-mail address.

S. "WORK" or "WORKS" means PLAINTIFF's copyrighted works, including but not limited to, motion pictures distributed through the Blacked, Tushy, and Vixen adult websites and DVDs.

T. "YOU," "YOUR," and "DEFENDANT" means [REDACTED] and his representatives, as well as all other persons acting on his behalf, including but not limited to Attorney J. Curtis Edmondson or Edmondson IP Law.

U. "YOUR SON" means [REDACTED] and his representatives, as well as all other persons acting on his behalf, including but not limited to his attorney.

V. As used herein, the connectives "and" and "or" shall be construed either disjunctively or conjunctively so as to acquire the broadest possible meaning.

W. As used herein, the terms "any," "all," and "each" shall be construed as "any, all, and each" inclusively.

X. As used herein, the use of the singular form of any word shall include the plural and vice versa.

Y. Masculine forms of any noun or pronoun shall embrace and be read to include the feminine or neuter, as the context may make appropriate.

INSTRUCTIONS

A. Each document request is to be answered fully, unless it is in good faith objected to, in which event the reasons for all of YOUR objections shall be stated in detail. If an objection pertains to only a portion of a document request, or to a word, phrase, or clause contained within such request, YOU shall state its objection to that portion only, and respond to the remainder of the document request, using your best efforts to do so. No part of a document request may be left unanswered merely because an objection is interposed to another part of the document request.

B. If, in responding to any of these document requests, YOU believe that YOU have encountered any ambiguity in construing either the document request or a definition or instruction relevant to it, YOUR response shall set forth the matter deemed ambiguous and the construction used in responding to the request.

C. If a document request is silent as to the time period for which production of documents or other things is sought, YOU shall produce all documents originated, in whole or in part, and of all things within YOUR possession, custody, or control at any time through the date of YOUR production.

D. Pursuant to F.R.C.P. Rule 34(b), each document and/or thing produced in response hereto is to be produced as it is kept in the usual course of business, including all file folders, binders, notebooks, and other devices by which such papers or things may be organized or separated.

E. Where a claim of privilege is asserted in objecting to any document request or sub-part thereof, YOU shall furnish the following information for each such claim:

1 1. The nature of the privilege (including work product) that is being
2 claimed, and, if the privilege is being asserted in connection with a claim or
3 defense governed by state law, indicate the state's privilege rule being invoked;

4 2. The request or specific portion of the request to which the
5 objection relates; and

6 3. If the privilege is being asserted for a particular document, a
7 description of the document, including:

- 8 a. the date of the document;
- 9 b. the identity of the author or preparer, including without
10 limitation, the author's or the preparer's name, address,
11 employment, and title;
- 12 c. the identities of each person who has sent or had access to or
13 custody of the document, together with an identification by
14 employment of each such person;
- 15 d. the location of the document; and
- 16 e. a summary of the document's subject matter.

17 F. If any document or thing otherwise responsive to any document request has been
18 lost, discarded, or destroyed since its preparation or receipt, YOU shall identify, as completely
19 as possible, the document or thing, state the document request to which it would be responsive,
20 and give full particulars or circumstances under which the document or thing was lost or
21 destroyed, including, without limitation, each document's date, the general nature of the
22 document (e.g., letter, memorandum, telegram, etc.), the subject matter of the document, each
23 author or originator, each person indicated as an addressee or copy recipient, or known by
24 YOU to have received a copy of the document or thing, and the document's former custodians.
25 In addition, as to each such document or thing, the following information shall be supplied:

- 26 1. date of disposal, loss, or destruction;
- 27

2. manner of disposal, loss, or destruction;
3. reason for disposal or destruction, or an explanation of the loss;
4. identity of the person authorizing the disposal or destruction;
5. identity of the person having knowledge of the disposal, loss, or destruction; and
6. identity of the person who destroyed, lost, or disposed of the document or thing.

G. In producing documents responsive to these requests, YOU shall produce all DOCUMENTS within YOUR possession, control, or custody.

H. These document requests are deemed to be continuing. If YOU, after responding, discover or acquire additional responsive DOCUMENTS, YOU are requested to produce such additional DOCUMENTS for inspection and copying, in accordance with F.R.C.P. Rule 26(e), no more than thirty (30) days after YOU discover or acquire such additional DOCUMENTS.

REQUESTS FOR PRODUCTION

REQUEST FOR PRODUCTION NO. 30:

All written retainers, fee agreements, or engagement letters between YOU and all YOUR attorneys and/or law firms representing YOU in this ACTION.

RESPONSE: John Doe objects that the request seeks privileged documents because it seeks “engagement letters” with his counsel that may include confidential communications that extend beyond the fee arrangement between Doe and his attorneys. “The purpose of the attorney-client privilege is to protect every person’s right to confide in counsel free from apprehension of disclosure of confidential communications.” *In re Osterhoudt*, 722 F.2d 591, 593 (9th Cir. 1983) (citations omitted). Fee arrangements fall outside the scope of the privilege because such information ordinarily reveals no confidential professional communication

1 between attorney and client. *Id.* Subject to and without waiving this objection, Doe will
2 produce the fee agreement with his attorneys.

3
4 **REQUEST FOR PRODUCTION NO. 31:**

5 Any and all DOCUMENTS which refer or relate to why you were first prescribed
6 Losartin or any generic version of Losartin.

7 **RESPONSE:** John Doe objects to this request because it violates John Doe's right to privacy.
8 *Bazzo v. Asuncion*, No. CV1607730CJCRAO, 2017 WL 10560631, at *3 (C.D. Cal. Aug. 28,
9 2017) (noting a party's privacy rights in his medical records and holding Defendant was not
10 entitled to discovery relating to medical conditions that were not at issue). John Doe further
11 objects to this request because it seeks production of documents that are neither relevant to the
12 claims or defenses of any party, nor proportional to the needs of the case. As stated in response
13 to Request for Production No. 22, John Doe's evidence of damages is that he has incurred
14 substantial attorneys' fees. He reiterated that his damages consist of attorneys' fees during his
15 deposition, as Strike 3 recently acknowledged. *See* ECF 126 at 7:1-2. For these reasons, John
16 Doe declines to respond.

17
18 **REQUEST FOR PRODUCTION NO. 32:**

19 Any and all DOCUMENTS which refer or relate to why you were first prescribed
20 Potassium or any generic version of Potassium.

21 **RESPONSE:** *See* Response to Request for Production No. 31.

22
23 **REQUEST FOR PRODUCTION NO. 33:**

24 Any and all DOCUMENTS which refer or relate to why you were first prescribed
25 Hydrochlorizide or any generic version of Hydrochlorizide.

26 **RESPONSE:** *See* Response to Request for Production No. 31.
27

REQUEST FOR PRODUCTION NO. 34:

Any and all DOCUMENTS which refer or relate to why you were first prescribed Verapamil or any generic version of Verapamil.

RESPONSE: *See* Response to Request for Production No. 31.

REQUEST FOR PRODUCTION NO. 35:

Any and all DOCUMENTS which refer or relate to why you were first prescribed Paroxetine Hydrochloride or any generic version of Paroxetine Hydrochloride.

RESPONSE: *See* Response to Request for Production No. 31.

REQUEST FOR PRODUCTION NO. 36:

Copies of any and all reports and records prepared by any physician, hospital or healthcare provider who has examined YOU between December 2016 to present day.

RESPONSE: *See* Response to Request for Production No. 31.

REQUEST FOR PRODUCTION NO. 37:

All DOCUMENTS and/or COMMUNICATIONS relating to any facts on the basis of which YOU assert that the conduct of STRIKE 3 HOLDINGS, LLC contributed to the injuries or losses YOU allegedly suffered.

RESPONSE: John Doe objects to this request as an overly broad and unduly burdensome. Subject to and without waiving this objection, John Doe responds as follows: *See* Strike 3's complaint, the pleadings Strike 3 filed in conjunction with seeking early discovery, the depositions of John Doe, Susan Stalzer, John Pasquale, Tobias Fieser, Jessica Fernandez, and Greg Lansky, and the expert reports of Dr. Eric Fruits and Dr. Kal Toth.

REQUEST FOR PRODUCTION NO. 38:

All COMMUNICATIONS between YOU and any and all witnesses in this ACTION, including taped recordings, whether transcribed or not, as well as all written statements.

RESPONSE: John Doe objects to this request because, as drafted, it encompasses attorney work product. The attorney work product doctrine is intended to “preserve a zone of privacy in which a lawyer can prepare and develop legal strategy with an eye toward litigation.” *Hickman v. Taylor*, 329 U.S. 495, 510–11 (1947). Interview notes and witness summaries drafted by counsel are subject to attorney work product protection. *See Upjohn Co. v. United States*, 449 U.S. 383, 400 (1981) (attorney memoranda based on witnesses' oral statements are protected by the work product doctrine). Subject to and without waiving this objection, John Doe has no responsive documents.

REQUEST FOR PRODUCTION NO. 39:

All DOCUMENTS which support the claim that YOU have an objectively reasonable apprehension of becoming the target of another copyright infringement lawsuit initiated by Strike 3 Holdings, LLC.

RESPONSE: John Doe objects to this request because it seeks production of documents that are already in Strike 3's possession, custody, or control, or otherwise more readily available to Strike 3 than to John Doe. Strike 3 chose to dismiss its claims against John Doe, without prejudice, which necessarily leaves open the ability to reassert its claims. Subject to and without waiving this objection, *see* Plaintiff's Notice of Voluntary Dismissal Without Prejudice (ECF 53).

REQUEST FOR PRODUCTION NO. 40:

Any and all DOCUMENTS which support YOUR claim that none of the COMPUTER DEVICES USED in YOUR HOME between August of 2016 and December of 2017 were ever used to download the WORKS listed in Exhibit A to Docket Entry No. 43.

RESPONSE: John Doe objects to this request to the extent it assumes facts not in evidence, namely, that he claimed none of the computer devices used in his home were ever used to download Strike 3's Works. John Doe "seeks affirmative relief that he did not infringe the works at issue," and represents only that he "does not know who downloaded these movies," ECF 64 at ¶¶ 1, 4. Subject to and without waiving this objection, *see* Expert Reports of Michael Yasumoto.

REQUEST FOR PRODUCTION NO. 41:

Any and all COMMUNICATIONS between YOU and/or YOUR attorneys of record in this case on the one hand, and YOUR SON and/or YOUR SON's attorneys (The Law Office of Joshua L. Turnham, PLLC) on the other hand.

RESPONSE: John Doe objects to this request because it seeks production of documents that are neither relevant to the claims or defenses of any party, nor proportional to the needs of the case. John Doe further objects to this request because it infringes on the common defense privilege, which "expands application of the attorney-client privilege or the work-product doctrine to circumstances in which it otherwise might not apply." *Griffith v. Davis*, 161 F.R.D. 687, 692 (C.D. Cal. 1995); *see also In re United Mine Workers of America Employee Ben. Plans Lit.* 159 F.R.D. 307, 313 n. 4 (D.D.C. 1994) (discussing application of common interest rule to both attorney-client privilege and work product doctrine); *Western Fuels Association, Inc. v. Burlington Northern Railroad Co.*, 102 F.R.D. 201, 203 (D.Wy. 1984) (applying doctrine to both attorney-client privilege and work product doctrine). John Doe declines to produce documents in response to this request based on the common interest privilege.

1
2 **REQUEST FOR PRODUCTION NO. 42:**

3 Any and all DOCUMENTS referring or relating to YOUR SON being able to exclude
4 YOU from entering into the room in which YOUR SON stays at YOUR HOME.

5 **RESPONSE:** John Doe objects to this request because it seeks production of documents that
6 are neither relevant to the claims or defenses of any party, nor proportional to the needs of the
7 case. Subject to and without waiving these objections, John Doe has no responsive documents.
8

9 **REQUEST FOR PRODUCTION NO. 43:**

10 DOCUMENTS that refer or relate to any form of physical restraint (including but not
11 limited to a lock) that enables YOUR SON to prevent YOU from entering the room where
12 YOUR SON stays at YOUR HOME.

13 **RESPONSE:** Doe objects to this request because it seeks production of documents that are
14 neither relevant to the claims or defenses of any party, nor proportional to the needs of the case.
15 Subject to and without waiving these objections, John Doe has no responsive documents.
16

17 **REQUEST FOR PRODUCTION NO. 44:**

18 Any and all DOCUMENTS executed prior to commencement of this ACTION, which
19 refers or relates to any conditions, rules, requirements, and/or understandings YOU had with
20 YOUR SON regarding his residing and/or staying in YOUR HOME. This includes but is not
21 limited to any lease and/or sublease agreements.

22 **RESPONSE:** John Doe objects to this request because it is overbroad in scope, conceivably
23 encompassing every communication between John Doe and his son for the last 44 years. John
24 Doe further objects to this request because it seeks production of documents that are neither
25 relevant to the claims or defenses of any party, nor proportional to the needs of the case.
26 Subject to and without waiving these objections, John Doe has no responsive documents.
27

REQUEST FOR PRODUCTION NO. 45:

Any and all DOCUMENTS evidencing the success copyright owners have had using or implementing the “DMCA process” described in Docket Entry No. 43 in this ACTION.

RESPONSE: John Doe objects to the term “DMCA process” as vague and ambiguous, such that John Doe is unable to interpret Strike 3’s request. Subject to and without waiving this objection, John Doe directs Strike 3 to the expert reports of Dr. Eric Fruits that have been produced in this matter and, in particular, to the aspects of those reports which discuss the DMCA.

REQUEST FOR PRODUCTION NO. 46:

Any and all agreements between YOU and any expert YOU retained in this ACTION.

RESPONSE: John Doe objects to this request because it exceeds the scope of documents a party is required to produce under Rule 26. Subject to this objection, John Doe declines to produce responsive documents within his possession, custody, or control.

REQUEST FOR PRODUCTION NO. 47:

Any and all COMMUNICATIONS between YOU and any expert YOU retained in this ACTION.

RESPONSE: John Doe objects to this request to the extent it exceeds the scope of documents a party is required to produce under Rule 26. Subject to the restrictions set forth in Rule 26(a)(2)(B), Rule 26(b)(3) and Rule 26(b)(4), John Doe will produce responsive documents within his possession, custody, or control.

REQUEST FOR PRODUCTION NO. 48:

Any and all DOCUMENTS evidencing all payments YOU made to any of YOUR experts for work completed in this ACTION.

RESPONSE: John Doe objects to this request to the extent it exceeds the scope of documents a party is required to produce under Rule 26. Subject to the restrictions set forth in Rule 26(a)(2)(B), Rule 26(b)(3) and Rule 26(b)(4), John Doe will produce responsive documents within his possession, custody, or control.

REQUEST FOR PRODUCTION NO. 49:

Any and all DOCUMENTS or electronic devices YOU provided to any of YOUR experts in this ACTION.

RESPONSE: John Doe objects to this request to the extent it exceeds the scope of documents a party is required to produce under Rule 26. Subject to the restrictions set forth in Rule 26(b)(3) and Rule 26(b)(4), *see* the Expert Reports of Michael Yasumoto.

REQUEST FOR PRODUCTION NO. 50:

Any and all DOCUMENTS evidencing that YOU financially support YOUR SON.

RESPONSE: John Doe objects to this request because it is overbroad in scope, conceivably encompassing every utility or grocery bill John Doe has paid for the last 44 years. John Doe further objects to this request because it seeks production of documents that are neither relevant to the claims or defenses of any party, nor proportional to the needs of the case. John Doe's son testified on June 3, 2019 that his parents provide him with food and housing, and that he does not pay rent.

1 **REQUEST FOR PRODUCTION NO. 51:**

2 Any and all DOCUMENTS evidencing that YOU are medically retired from YOUR
3 previous law enforcement career.

4 **RESPONSE:** See Response to Request for Production No. 31.

6 **REQUEST FOR PRODUCTION NO. 52:**

7 Any and all DOCUMENTS evidencing that YOU purchased software licenses for
8 Microsoft Windows 7, Microsoft Windows 8, Microsoft Windows 10, and Avast Antivirus.

9 **RESPONSE:** John Doe objects to this request because it seeks production of documents that
10 are neither relevant to the claims or defenses of any party, nor proportional to the needs of the
11 case. John Doe further objects that this request is overbroad as to time. Subject to and without
12 waiving these objections, John Doe will produce responsive documents in his possession,
13 custody, and control, if any.

15 **REQUEST FOR PRODUCTION NO. 53:**

16 Any and all COMMUNICATIONS between YOU and YOUR SON regarding the use
17 of the COMPUTER DEVICES at YOUR RESIDENCE.

18 **RESPONSE:** John Doe objects to this request because it seeks production of documents that
19 are neither relevant to the claims or defenses of any party, nor proportional to the needs of the
20 case. John Doe further objects to the use of the term, in all caps, YOUR RESIDENCE, which is
21 undefined. Subject to and without waiving these objections, John Doe has no responsive
22 documents.

24 **REQUEST FOR PRODUCTION NO. 54:**

25 Any and all DOCUMENTS related to YOUR SON's computer which he primarily used
26 between August 2016 and December 2017.

1 **RESPONSE:** John Doe objects to this request to the extent it imposes upon John Doe any
 2 burden to assist Strike 3 in supporting its defenses to the litigation, particularly when Strike 3's
 3 request seeks documents that are not, and would not be, in John Doe's possession, custody, or
 4 control, but if they exist, are in the hands of a third party. Subject to and without waiving these
 5 objections, John Doe will produce responsive documents in his possession, custody, or control,
 6 if any.

7
 8 **REQUEST FOR PRODUCTION NO. 55:**

9 Any and all documents related to YOUR SON's new computer which YOU gifted to
 10 YOUR SON between March 2018 and April 2018, including but not limited to any receipts,
 11 order forms, and bid regarding the purchase of parts.

12 **RESPONSE:** John Doe objects to this request to the extent it assumes facts not in evidence,
 13 namely, that John Doe gifted his son a new computer in March or April 2018. In his deposition,
 14 John Doe "guessed" that this was the timeframe. John Doe further objects to this request
 15 because it seeks production of documents that are neither relevant to the claims or defenses of
 16 any party, nor proportional to the needs of the case. Subject to and without waiving these
 17 objections, John Doe will produce responsive documents in his possession, custody, and
 18 control, if any.

19
 20 **REQUEST FOR PRODUCTION NO. 56:**

21 Any and all DOCUMENTS which evidence that YOU are the individual who pays for
 22 the internet service at YOUR RESIDENCE.

23 **RESPONSE:** John Doe objects to this request because it is overbroad as to time, conceivably
 24 encompassing every document related to John Doe's internet service from inception. John Doe
 25 further objects to this request because it seeks production of documents that are neither relevant
 26 to the claims or defenses of any party, nor proportional to the needs of the case. John Doe
 27

1 already testified in his deposition that he pays for the internet. Subject to and without waiving
2 these objections, John Doe will produce responsive documents in his possession, custody, and
3 control which establish who paid for the internet service in 2017.
4

5 **REQUEST FOR PRODUCTION NO. 57:**

6 Any and all DOCUMENTS related to YOUR SON's advertisement, transaction, and
7 sale of YOUR SON's computer in March 2018 which he primarily used between August 2016
8 and December 2017.

9 **RESPONSE:** John Doe objects to this request to the extent it assumes facts not in evidence,
10 namely, that John Doe's son sold his computer in March 2018. In his deposition, John Doe
11 "guessed" that his son sold the computer in March or April of 2018. However, John Doe's son
12 testified recently that he sold components from his computer in 2017 prior to the initiation of
13 Strike 3's lawsuit. John Doe further objects to this request to the extent it imposes upon John
14 Doe any burden to assist Strike 3 in supporting its defenses to the litigation, particularly when
15 Strike 3's request seeks documents that are not, and would not be, in John Doe's possession,
16 custody, or control, and where John Doe's son has already testified that such documents do not
17 exist.
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CERTIFICATION OF ATTORNEY

I am one of the attorneys for Defendant John Doe in this matter. I hereby certify that I have read the foregoing Plaintiff's Second Set of Requests for Production and Responses Thereto, and believe that the same are in compliance with Federal Rule of Civil Procedure 26(g).

DATED this 6th day of June, 2019.

TERRELL MARSHALL LAW GROUP PLLC

By: /s/ Adrienne D. McEntee, WSBA #34061

Adrienne D. McEntee, WSBA #34061
Email: amcentee@terrellmarshall.com
936 North 34th Street, Suite 300
Seattle, Washington 98103-8869
Telephone: (206) 816-6603
Facsimile: (206) 319-5450

CERTIFICATE OF SERVICE

I, Adrienne D. McEntee, hereby certify that on June 6, 2019, I electronically transmitted the foregoing to the following:

Lincoln D. Bandlow, *Admitted Pro Hac Vice*
Email: lincoln@bandlowlaw.com
LAW OFFICES OF LINCOLN BANDLOW, P.C.
1801 Century Park East, Suite 2400
Los Angeles, California 90067
Telephone: (310) 556-9580
Facsimile: (310) 861-5550

John C. Atkin, *Admitted Pro Hac Vice*
Email: jatkin@atkinfirm.com
THE ATKIN FIRM, LLC
55 Madison Avenue, Suite 400
Morristown, New Jersey 07960
Telephone: (973) 285-3239

Jeremy E. Roller, WSBA #32021
Email: jroller@aretelaw.com
ARETE LAW GROUP PLLC
1218 Third Avenue, Suite 2100
Seattle, Washington 98101
Telephone: (206) 428-3250
Facsimile: (206) 428-3251

Attorneys for Plaintiff

DATED this 6th day of June, 2019.

TERRELL MARSHALL LAW GROUP PLLC

By: /s/ Adrienne D. McEntee, WSBA #34061
Adrienne D. McEntee, WSBA 34061
Email: amcentee@terrellmarshall.com
936 North 34th Street, Suite 300
Seattle, Washington 98103-8869
Telephone: (206) 816-6603
Facsimile: (206) 319-5450

Attorneys for Defendant

Exhibit B



lincoln@bandlowlaw.com

June 14, 2019

VIA EMAIL:

Joseph Curtis Edmondson, Esq.
Law Office of J. Curtis Edmondson
Venture Commerce Center
3699 NE John Olsen Ave.
Hillsboro, OR 97124
jcedmondson@edmolaw.com

RE: *Strike 3 Holdings, LLC v. Doe*, W.D. Wash. Civil Case No. CV 2:17-01731-TSZ; WAWD-1003-SEAT, Conferral on Defendant's Responses to Plaintiff's Second Request for Production

Dear Mr. Edmondson,

Plaintiff, Strike 3 Holdings, LLC, has received your client's Response to Plaintiff's Second Set of Requests for Production dated June 6, 2019. The purpose of this letter is to identify those responses which are deficient or warrant clarification. Several of the objections are vague or untenable, and it is not clear on which basis Defendant withholds certain documents or even if documents are being withheld. Additionally, although Defendant notes in multiple responses that documents will be produced, Strike 3 has not received most of these documents, and seeks to clarify if and when documents will be produced in response to those requests.

For your convenience, below I have restated each request, your client's response, and provided an explanation on why Defendant's response is insufficient or requires clarification. Please provide me with a suitable date and time that we may discuss these discovery disputes via telephone. Although Plaintiff believes these issues can be easily resolved during a telephonic meet-and-confer, if the parties are unable to resolve same, Plaintiff will seek court intervention. Fed. R. Civ. P. 37(a)(1); LCR 37(a)(1).

Request No. 30

Request No. 30 asked Defendant for "All written retainers, fee agreements, or engagement letters between YOU and all YOUR attorneys and/or law firms representing YOU in this ACTION." Defendant's response states "John Doe objects that the request seeks privileged documents because it seeks "engagement letters" with his counsel that may include confidential communications that extend beyond the fee arrangement between Doe and his attorneys. "The purpose of the attorney-client privilege is to protect every person's right to confide in counsel free from apprehension of disclosure of confidential communications." *In re Osterhoudt*, 722

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F.2d 591, 593 (9th Cir. 1983) (citations omitted). Fee arrangements fall outside the scope of the privilege because such information ordinarily reveals no confidential professional communication between attorney and client. *Id.* Subject to and without waiving this objection, Doe will produce the fee agreement with his attorneys.”

As discussed in Plaintiff’s recent Motion to Compel and Defendant’s Response thereto, [Dkt. 126, 131, 135], the fee agreement and related retainer and engagement letters are not protected by attorney-client privilege. Indeed, Defendant has produced the Fee Agreement between you and Defendant. However, to date, Defendant has only produced that one agreement, but no other agreements, retainers, or engagement letters with any other counsel, including but not limited to Ms. McEntee and her firm. Plaintiff seeks clarification that no other documents of this kind exists, and if they do, Plaintiff seeks Defendant’s basis for withholding production. Please be advised that if there is a fee agreement between your (or your law firm) and Ms. McEntee and/or her firm Terrell Marshal Law Group, PLLC, production of that agreement cannot be withheld. Indeed, we would have to assume that you (or your firm) would have entered into such an agreement as an agent for Defendant. As such, Strike 3 demands production.

Requests Nos. 31–36, 51

Request No. 31 asked Defendant for “Any and all DOCUMENTS which refer or relate to why you were first prescribed Losartin or any generic version of Losartin.” Similarly, **Requests Nos. 32, 33, and 35** asked Defendant for similar documents with regarding Potassium, Hydrochlorizide, Verapamil, and Paroxetine Hydrochloride respectively. **Request No. 36** relatedly asked for “Copies of any and all reports and records prepared by any physician, hospital or healthcare provider who has examined YOU between December 2016 to present day.” And finally, **Request No. 51** asked for “Any and all DOCUMENTS evidencing that YOU are medically retired from YOUR previous law enforcement career.” To all these Requests, Defendant responded, “John Doe objects to this request because it violates John Doe’s right to privacy. *Bazzo v. Asuncion*, No. CV1607730CJCRAO, 2017 WL 10560631, at *3 (C.D. Cal. Aug. 28, 2017) (noting a party’s privacy rights in his medical records and holding Defendant was not entitled to discovery relating to medical conditions that were not at issue). John Doe further objects to this request because it seeks production of documents that are neither relevant to the claims or defenses of any party, nor proportional to the needs of the case. As stated in response to Request for Production No. 22, John Doe’s evidence of damages is that he has incurred substantial attorneys’ fees. He reiterated that his damages consist of attorneys’ fees during his deposition, as Strike 3 recently acknowledged. *See* ECF 126 at 7:1-2. For these reasons, John Doe declines to respond.”

Plaintiff is willing to consider accepting these responses provided that Defendant stipulates that he is not seeking any damages related to his health or any medical condition. If Defendant will not stipulate to this, Plaintiff will need to move to compel. While you are correct that “[a] party enjoys privacy rights in his medical records in general[,] [...] a party may waive these privacy rights if the party puts their contents at issue in a case.” *Id.* (quoting *Anderson v.*



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Clawson, No. CV 13-0307 LHK (PR), 2014 WL 3725856, at *2 (N.D. Cal. July 25, 2014) (emphasis supplied)). Here, Plaintiff does not seek all medical records, but a limited set of records relating back to a limited point in time (when Defendant was first prescribed these medications). This is relevant to establishing whether and to what extent Plaintiff's Complaint filed November 16, 2017 caused these medical injuries. The same goes for the medical records demanded in Request No. 36. While Defendant suggests that his counterclaims for Negligent Infliction of Emotional Distress and Outrage, *see* Dkt 22, ¶¶ 15, 22, are no longer at play here, Defendant has continued to note Plaintiff's litigation has caused him to "suffer[] extreme stress, resulting in high blood pressure and insomnia[.]" *See* Dkt. 79, at 7. Strike 3 demands clarification on what damages Defendant alleges, and on what basis he withholds these relevant documents. If damages related to Defendant's health or any medical condition are sought in this case, Defendant's responses are improper and the requested documents must be immediately produced.

Request No. 37

Request No. 37 asked Defendant for "All DOCUMENTS and/or COMMUNICATIONS relating to any facts on the basis of which YOU assert that the conduct of STRIKE 3 HOLDINGS, LLC contributed to the injuries or losses YOU allegedly suffered." Defendant's response states, "John Doe objects to this request as an overly broad and unduly burdensome. Subject to and without waiving this objection, John Doe responds as follows: *See* Strike 3's complaint, the pleadings Strike 3 filed in conjunction with seeking early discovery, the depositions of John Doe, Susan Stalzer, John Pasquale, Tobias Fieser, Jessica Fernandez, and Greg Lansky, and the expert reports of Dr. Eric Fruits and Dr. Kal Toth."

Strike 3 requests clarification here. It appears that Defendant is suggesting the Plaintiff's cause of Defendant's injuries resulted from Plaintiff's filing of its Complaint, Motion for Leave to Serve a Third-Party Subpoena Prior to a Rule 26(f) Conference and corresponding documents, along with the preparation of expert reports and depositions of witnesses in response to Defendant's counterclaims – all actions squarely envisaged by the Federal Rules of Civil Procedure. If this is all the documents and communications Defendant intends to use at trial to demonstrate causation of harm, Strike 3 demands Defendant clarify. To make production easier, Plaintiff would be satisfied if Defendant at least confirmed that all documents responsive to this request have either already been produced to Plaintiff or are publicly available on the docket in this matter.

Request No. 38

Request No. 38 asked Defendant for "All COMMUNICATIONS between YOU and any and all witnesses in this ACTION, including taped recordings, whether transcribed or not, as well as all written statements." Defendant's response states "John Doe objects to this request because, as drafted, it encompasses attorney work product. The attorney work product doctrine is intended to "preserve a zone of privacy in which a lawyer can prepare and develop legal



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strategy with an eye toward litigation.” *Hickman v. Taylor*, 329 U.S. 495, 510–11 (1947). Interview notes and witness summaries drafted by counsel are subject to attorney work product protection. *See Upjohn Co. v. United States*, 449 U.S. 383, 400 (1981) (attorney memoranda based on witnesses' oral statements are protected by the work product doctrine). Subject to and without waiving this objection, John Doe has no responsive documents.”

“[W]itness statements are not protected work-product.” *See Heath v. F/V ZOLOTOTI*, 221 F.R.D. 545, 549 (W.D. Wash. 2004). “The burden is on the party asserting a work-product privilege to show that the withheld information was prepared in anticipation of litigation.” *James Stewart Entm't, LLC v. L&M Racing, LLC*, No. CV 13-1249 (JGB)(SPx), 2013 WL 12249550, at *3 (C.D. Cal. July 3, 2013). “The principles announced in *Hickman v. Taylor* have been codified in Rule 26(b)(3), which] provides that ‘a party may not discover documents . . . that are prepared in anticipation of litigation or for trial’ unless the documents ‘are otherwise discoverable under Rule 26(b)(1) . . . and . . . the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.’” *Id.* (quoting Fed. R. Civ. P. 26(b)(3)(A)). Defendant has only provided this blanket privilege objection, and not explained why these documents are protected work-product. That being said, Defendant claims he does not possess any responsive documents to produce here. To be clear, this would mean that Defendant never emailed or communicated with his expert witnesses in this matter, which may contradict some of his responses. *See infra. Response to Request No. 45* (relying on Dr. Fruits expert report for the basis of DMCA claim). Strike 3 demands clarification whether no responsive documents exists.

Request No. 39

Request No. 39 asked Defendant for “All DOCUMENTS which support the claim that YOU have an objectively reasonable apprehension of becoming the target of another copyright infringement lawsuit initiated by Strike 3 Holdings, LLC.” Defendant’s response states “John Doe objects to this request because it seeks production of documents that are already in Strike 3’s possession, custody, or control, or otherwise more readily available to Strike 3 than to John Doe. Strike 3 chose to dismiss its claims against John Doe, without prejudice, which necessarily leaves open the ability to reassert its claims. Subject to and without waiving this objection, *see* Plaintiff’s Notice of Voluntary Dismissal Without Prejudice (ECF 53).”

Defendant’s response does not expressly list which documents are responsive. Strike 3 requests clarification whether Defendant’s claim of a reasonable apprehension of being sued in another suit is solely based on Plaintiff’s Notice of Voluntarily Dismissal Without Prejudice, or whether there are additional document to support Defendant’s alleged apprehension. To make production easier, Plaintiff would be satisfied if Defendant at least confirmed that all documents responsive to this request have either already been produced to Plaintiff or are publicly available on the docket in this matter.



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Request No. 40

Request No. 40 asked Defendant for “Any and all DOCUMENTS which support YOUR claim that none of the COMPUTER DEVICES USED in YOUR HOME between August of 2016 and December of 2017 were ever used to download the WORKS listed in Exhibit A to Docket Entry No. 43.” Defendant’s response states “John Doe objects to this request to the extent it assumes facts not in evidence, namely, that he claimed none of the computer devices used in his home were ever used to download Strike 3’s Works. John Doe ‘seeks affirmative relief that he did not infringe the works at issue,’ and represents only that he ‘does not know who downloaded these movies,’ ECF 64 at ¶¶ 1, 4. Subject to and without waiving this objection, *see* Expert Reports of Michael Yasumoto.”

The Expert Reports of Michael Yasumoto are not fully responsive to this Request. Those Reports only examined two hard drives, a Seagate (Serial No. 9VP05TWX) and an Asus (Serial Nos. PF1G95B15000014 or 95PDAG039530), whereas Defendant has noted that over 100 hard drives exists at his residence and denies having ever infringed Plaintiff’s works. If Mr. Yasumoto’s Reports is the only document Defendant has to support this claim, Strike 3 demands confirmation. Moreover, since Defendant now contends that Plaintiff “assumes facts not in evidence” concerning whether a computer device from Defendant’s residence was used to download Plaintiff’s works, Strike 3 seeks clarification whether Defendant now takes the position that Plaintiff’s claim, that a computer device in Defendant’s home *was* used to download Plaintiff’s works, is a plausible claim.

Request No. 41

Request No. 41 asked Defendant for “Any and all COMMUNICATIONS between YOU and/or YOUR attorneys of record in this case on the one hand, and YOUR SON and/or YOUR SON’s attorneys (The Law Office of Joshua L. Turnham, PLLC) on the other hand.” Defendant’s response states “John Doe objects to this request because it seeks production of documents that are neither relevant to the claims or defenses of any party, nor proportional to the needs of the case. John Doe further objects to this request because it infringes on the common defense privilege, which “expands application of the attorney-client privilege or the work-product doctrine to circumstances in which it otherwise might not apply.” *Griffith v. Davis*, 161 F.R.D. 687, 692 (C.D. Cal. 1995); *see also In re United Mine Workers of America Employee Ben. Plans Lit.* 159 F.R.D. 307, 313 n. 4 (D.D.C. 1994) (discussing application of common interest rule to both attorney-client privilege and work product doctrine); *Western Fuels Association, Inc. v. Burlington Northern Railroad Co.*, 102 F.R.D. 201, 203 (D.Wy. 1984) (applying doctrine to both attorney-client privilege and work product doctrine). John Doe declines to produce documents in response to this request based on the common interest privilege.”

This is the first time Plaintiff has been informed that “common defense” between Defendant and his son is being asserted in this matter. Even if such a defense were to exist



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between the two, however, it does not privilege the documents sought by Request No. 41. That is because the “privilege protects the confidentiality of communications passing from one party to the attorney of another party *when made to further a joint effort*” ensuring this pass through does not waive what would otherwise be a privileged attorney-client communication. *See Avocent Redmond Corp. v. Rose Elecs., Inc.*, 516 F. Supp. 2d 1199, 1202 (W.D. Wash. 2007) (citation omitted) (emphasis supplied). “The common interest or joint defense privilege applies where (1) the communication was made by separate parties in the course of a matter of common interest or joint defense; (2) the communication was designed to further that effort; and (3) the privilege has not been waived.” *Id.* (collecting cases). Defendant carries the burden to show the joint defense privilege applies yet has not done so. Strike 3 demands further clarification about what communications are being withheld and on what basis they are undiscoverable. Plaintiff also demands a privilege log.

Requests Nos. 42–43

Request No. 42 asked Defendant for “Any and all DOCUMENTS referring or relating to YOUR SON being able to exclude YOU from entering into the room in which YOUR SON stays at YOUR HOME.” Relatedly, **Request No. 43** asked for “DOCUMENTS that refer or relate to any form of physical restraint (including but not limited to a lock) that enables YOUR SON to prevent YOU from entering the room where YOUR SON stays at YOUR HOME.” Defendant’s responds to both Requests identically: “Doe objects to this request because it seeks production of documents that are neither relevant to the claims or defenses of any party, nor proportional to the needs of the case. Subject to and without waiving these objections, John Doe has no responsive documents.”

Strike 3’s requests are relevant to showing Defendant’s possession, custody, *control*, or lack thereof of evidence contained in Defendant’s Son’s room. Strike 3 demands clarification whether no documents exists in response to Requests Nos. 42 and 43, or whether Defendant is positing that such documents (related to his son’s ability to exclude Defendant from the son’s room) are not in his possession, custody, or control.

Request No. 45

Request No. 45 asked Defendant for “Any and all DOCUMENTS evidencing the success copyright owners have had using or implementing the ‘DMCA process’ described in Docket Entry No. 43 in this ACTION.” Defendant’s response states “John Doe objects to the term ‘DMCA process’ as vague and ambiguous, such that John Doe is unable to interpret Strike 3’s request. Subject to and without waiving this objection, John Doe directs Strike 3 to the expert reports of Dr. Eric Fruits that have been produced in this matter and, in particular, to the aspects of those reports which discuss the DMCA.”

As a point of clarification, Plaintiff’s use of the phrase “DMCA process” is in reference to Defendant’s Second Amended Counterclaim that states “Congress, intended, when it passed



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the DMCA, that S3H would use the easy and low cost *DMCA process* to give notice to the allegedly infringing IP addresses” and “S3H does not use the *DMCA process* as this would likely end or at least significantly curtail any infringements, thus eliminating the targets of this sham litigation.” See Dkt. 64, ¶¶ 49–50 (emphasis supplied). It is understood by now that by “DMCA process,” Defendant has consistently intended it to refer to the mechanism outlined in 17 U.S.C. § 512 to notify an individual about infringement and this is the basis of Defendant’s counterclaim for abuse of process. Regardless, Dr. Fruits’ Report makes only brief mention of the DMCA and merely discusses the general policy underlying the DMCA (quoting *In re Charter Commc’ns, Subpoena Enforcement Matter*, 393 F.3d at 773 (8th Cir. 2005) and the existence of Comcast’s DMCA policy. See Dkt. 81, ¶¶ 10–12. This says nothing about the “success” of other rightsholders using the DMCA process. If this is all Defendant intends to rely on for this proposition, Strike 3 requires clarification. On the other hand, if Defendant has *no documents regarding the “success”* of other parties in using the DMCA process to deter piracy, that would also need to be clarified.

Request No. 46

Request No. 46 asked Defendant for “Any and all agreements between YOU and any expert YOU retained in this ACTION.” Defendant’s response states “John Doe objects to this request because it exceeds the scope of documents a party is required to produce under Rule 26. Subject to this objection, John Doe declines to produce responsive documents within his possession, custody, or control.”

Defendant has not invoked privilege here. Rightfully so, as none apply for similar reasons the Fee Agreement was not privileged. Defendant also provides no explanation, citation, or hint at why Request No. 46 exceeds Rule 26’s purview. Rule 26’s scope is governed by “relevancy,” which is afforded a broad latitude, see *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978), and renders these agreements discoverable. This is all the more concerning since Defendant has made expert costs and fees part of his sole basis for injury in his counterclaims. *Supra*, *Response to Requests No. 37*. Strike 3 demands clarification as to what documents are being withheld and on what basis. Finally, although “Rules 26(b)(3)(A) and (B) protect communications between the party’s attorney and any witness required to provide a report under Rule 26(a)(2)(B),” the rule notes an exception “to the extent that the communications: (i) relate to compensation for the expert’s study or testimony[.]” Fed. R. Civ. P. 26 (b)(4)(C)(i). And, retention agreements relate to compensation of the expert’s study or testimony. Absent a strong showing of irrelevance, Strike 3 will move to compel production of these documents.

Request No. 47

Request No. 47 asked Defendant for “Any and all COMMUNICATIONS between YOU and any expert YOU retained in this ACTION.” Defendant’s response states “John Doe objects to this request to the extent it exceeds the scope of documents a party is required to produce under Rule 26. Subject to the restrictions set forth in Rule 26(a)(2)(B), Rule 26(b)(3) and Rule



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26(b)(4), John Doe will produce responsive documents within his possession, custody, or control.”

Defendant has failed to explain why this request is irrelevant, let alone why it exceeds the scope of Rule 26. Additionally, Defendant has not produced these documents to Plaintiff. Further, although “Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B),” the rule notes an exception “to the extent that the communications: (i) relate to compensation for the expert's study or testimony; (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or (iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.” Fed. R. Civ. P. 26 (b)(4)(C)(i)-(iii). Strike 3 demands clarification on the basis to Defendant’s objection, and whether he is withholding any relevant communications.

Request No. 48

Request No. 48 asked Defendant for “Any and all DOCUMENTS evidencing all payments YOU made to any of YOUR experts for work completed in this ACTION.” Defendant’s response states “John Doe objects to this request to the extent it exceeds the scope of documents a party is required to produce under Rule 26. Subject to the restrictions set forth in Rule 26(a)(2)(B), Rule 26(b)(3) and Rule 26(b)(4), John Doe will produce responsive documents within his possession, custody, or control.”

Defendant has failed to explain why this request is irrelevant, let alone why it exceeds the scope of Rule 26. Additionally, Defendant has not produced these documents to Plaintiff. Further, although “Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B),” the rule notes an exception “to the extent that the communications: (i) relate to compensation for the expert's study or testimony; (ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or (iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.” Fed. R. Civ. P. 26 (b)(4)(C)(i)-(iii). Strike 3 demands clarification as to the basis to Defendant’s objection, and whether he is withholding any relevant documents.

Request No. 49

Request No. 49 asked Defendant for “Any and all DOCUMENTS or electronic devices YOU provided to any of YOUR experts in this ACTION.” Defendant’s response states “John Doe objects to this request to the extent it exceeds the scope of documents a party is required to produce under Rule 26. Subject to the restrictions set forth in Rule 26(b)(3) and Rule 26(b)(4), *see* the Expert Reports of Michael Yasumoto.”



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Similar to Defendant's response in Request No. 40, this response is inadequate. First, there is no legitimate argument to asserting the electronic devices turned over to Mr. Yasumoto for examination, which form the basis of that Report as well as your claim that the hard drives contain no evidence of Plaintiff's works, is not relevant. Second, Mr. Yasumoto's Report does not contain the electronic devices that forms the basis of Request 49 and thus fails to respond to this Request for Production. *See also* Fed. R. Evid. 1002; *United States v. VeVea*, 446 F. App'x 63, 67 (9th Cir. 2011) ("[F]or purposes of the best evidence rule, data produced by an electronic device is a 'writing' subject to the rule."). Strike 3 demands clarification whether Defendant intends to produce the electronic devices at issue here or whether he intends to withhold them, and on what basis. Strike 3 will move to compel production if necessary.

Request No. 53

Request No. 53 asked Defendant for "Any and all COMMUNICATIONS between YOU and YOUR SON regarding the use of the COMPUTER DEVICES at YOUR RESIDENCE." Defendant's response states "John Doe objects to this request because it seeks production of documents that are neither relevant to the claims or defenses of any party, nor proportional to the needs of the case. John Doe further objects to the use of the term, in all caps, YOUR RESIDENCE, which is undefined. Subject to and without waiving these objections, John Doe has no responsive documents."

This request is highly relevant to issues of possession and control of the computer devices in question, whether the parties knew about their duty to preserve evidence, and general BitTorrent activity taking place at the residence. It is proportional, as well, since Defendant has made DMCA notices – and hence awareness of infringement – an issue in this matter. Although "YOUR RESIDENCE" is not technically defined in Plaintiff's Definitions section, the meaning is sufficiently clear such that it is not subject to more than one reasonable interpretation. Plaintiff is uncertain that no such communications exists (for example, emails or text messages), and demands Defendant clarify whether any communications exists.

Request No. 54

Request No. 54 asked Defendant for "Any and all DOCUMENTS related to YOUR SON's computer which he primarily used between August 2016 and December 2017." Defendant's response states "John Doe objects to this request to the extent it imposes upon John Doe any burden to assist Strike 3 in supporting its defenses to the litigation, particularly when Strike 3's request seeks documents that are not, and would not be, in John Doe's possession, custody, or control, but if they exist, are in the hands of a third party. Subject to and without waiving these objections, John Doe will produce responsive documents in his possession, custody, or control, if any."

The objection here is baseless. Defendant has not described how this would unduly burden him, and it is reasonable that Defendant has custody and control of such documents since,



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as Defendant claims, he primarily provides for Defendant's son's finances and he owns (and lives in) the home where his Son resides. Thus, Defendant has not stated why he is unable to produce them. Regardless, Strike 3 has not received any responsive documents to this request, and demands clarification whether any will be produced or whether Defendant intends to withhold any and on what basis. Moreover, we seek clarification regarding the identity of the "third parties" your client appears to be contending have possession of the requested documents.

Request No. 55

Request No. 55 asked Defendant for "Any and all documents related to YOUR SON's new computer which YOU gifted to YOUR SON between March 2018 and April 2018, including but not limited to any receipts, order forms, and bid regarding the purchase of parts." Defendant's response states "John Doe objects to this request to the extent it assumes facts not in evidence, namely, that John Doe gifted his son a new computer in March or April 2018. In his deposition, John Doe 'guessed' that this was the timeframe. John Doe further objects to this request because it seeks production of documents that are neither relevant to the claims or defenses of any party, nor proportional to the needs of the case. Subject to and without waiving these objections, John Doe will produce responsive documents in his possession, custody, and control, if any."

Strike 3 does not understand the qualification "if any" at the end of Defendant's response stating that he will produce such documents. Moreover, Defendant's objection that Request No. 55 assumes facts not in evidence is nonsense since it was Defendant that provided the apparently erroneous information. Certainly, Defendant knows what computer he was referencing in his deposition and hence what Plaintiff refers to now. Defendant also does not explain why these documents are not relevant or proportional to this case. Strike 3 demands clarification on when these documents will be produced, and on which documents are not being produced pursuant to the objections listed. Strike 3 further demands clarification on how Defendant defines "Possession, custody, and control."

Request No. 56

Request No. 56 asked Defendant for "Any and all DOCUMENTS which evidence that YOU are the individual who pays for the internet service at YOUR RESIDENCE." Defendant's response states "John Doe objects to this request because it is overbroad as to time, conceivably encompassing every document related to John Doe's internet service from inception. John Doe further objects to this request because it seeks production of documents that are neither relevant to the claims or defenses of any party, nor proportional to the needs of the case. John Doe already testified in his deposition that he pays for the internet. Subject to and without waiving these objections, John Doe will produce responsive documents in his possession, custody, and control which establish who paid for the internet service in 2017."

Defendant has not yet produced any responsive documents to this request. These documents are highly relevant and proportional to this case, especially with respect to standing



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for both counterclaims. In the interest of resolving the issue, Strike 3 will narrow the request to documents sent to Defendant by his internet service provider from the period of recorded infringement (August 2016) to the present.

Request No. 57

Request No. 57 asked Defendant for “Any and all DOCUMENTS related to YOUR SON’s advertisement, transaction, and sale of YOUR SON’s computer in March 2018 which he primarily used between August 2016 and December 2017.” Defendant’s response states “John Doe objects to this request to the extent it assumes facts not in evidence, namely, that John Doe’s son sold his computer in March 2018. In his deposition, John Doe ‘guessed’ that his son sold the computer in March or April of 2018. However, John Doe’s son testified recently that he sold components from his computer in 2017 prior to the initiation of Strike 3’s lawsuit. John Doe further objects to this request to the extent it imposes upon John Doe any burden to assist Strike 3 in supporting its defenses to the litigation, particularly when Strike 3’s request seeks documents that are not, and would not be, in John Doe’s possession, custody, or control, and where John Doe’s son has already testified that such documents do not exist.”

First, we disagree that your client’s son testified that he sold components in 2017. In fact, he testified that it was 2018. Second, Strike 3 will refine Request No. 57 to request “any and all DOCUMENTS related to YOUR SON’s advertisement, transaction, and sale components of YOUR SON’s computer in the years 2017 and 2018.” Despite Defendant’s objection, he has not shown why these documents are not within his control. Strike 3 demands clarification that Defendant (as opposed to his son) claims that no responsive documents exists.

TELEPHONIC CONFERRAL SCHEDULING

If we are unable to resolve these issues, I have been instructed to move to compel production. Please advise of your availability on Monday, June 17 (after 2:30 p.m) or Tuesday, June 18 (any time) for us to hold a telephonic meet and confer conference.

Sincerely,

A handwritten signature in blue ink, appearing to read "L. Bandlow".

Lincoln D. Bandlow

cc: Adrienne McEntee (via email)
John Atkin (via email)
Jeremy Roller (via email)